

1
2
3
4
5
6
7
8
9 UNITED STATES DISTRICT COURT
10 SOUTHERN DISTRICT OF CALIFORNIA

11 IN RE: INCRETIN MIMETICS
12 PRODUCTS LIABILITY
13 LITIGATION

) MDL Case No.13md2452 AJB (MDD)

) As to all related and member cases

14) **ORDER GRANTING JOINT**
15) **MOTION RELATED TO FILINGS**
16) **BY DERIVATIVE PLAINTIFFS**
17) **ACTING AS INTERIM ESTATE**
18) **REPRESENTATIVES**

19) (Doc. No. 535)
20
21
22
23
24
25
26
27
28

On August 5, 2014, the Plaintiffs' Steering Committee ("PSC") and Defendants Eli Lilly and Company, Amylin Pharmaceuticals Inc., Merck Sharp & Dohme Corp., and Novo Nordisk Inc. ("Defendants") filed a joint motion for approval of a Stipulation concerning derivative plaintiffs acting as interim estate representatives for a deceased Injured Party under certain circumstances, as stipulated by the Parties. The Parties have moved this Court to approve the stipulation and further order that such stipulated Interim Estate Representatives have authority to execute authorizations for the collection of medical and other records for all purposes in MDL 2452.

ACCORDINGLY, WHEREAS the Court finds that the PSC and Defendants have stipulated as follows:

1 A. With respect to any action currently pending or hereafter directly filed or
2 transferred into this MDL, in the event a state or federal court of competent jurisdiction has
3 not appointed a person to serve as a representative for the estate and/or beneficiaries of a
4 deceased Injured Party --

5 (i) the person designated as the personal representative in the Will of the
6 decedent (if any); and/or;

7 (ii) the surviving spouse , with the consent of any and all children of the
8 decedent , and anyone identified as the personal representative in the Will (if any); and/or

9 (iii) a beneficiary who succeeds to a cause of action under the Will (if any)
10 or state intestate law, with the consent of any surviving spouse, any adult children of the
11 decedent, and anyone identified as the personal representative in the Will (if any) --

12 may act as an Interim Estate Representative for all purposes related to the pre-trial
13 proceedings of any and all claims related to the Injured Party pending in MDL 2452.

14 B. Where the decedent Injured Party has minor children and/or beneficiaries,
15 defendants reserve the option of requiring the appointment of a person who is formally
16 qualified and/or appointed by another state or federal court to represent the estate, with 90
17 days notice, and cause shown.

18 C. For cases currently pending in MDL 2452 ("Pending Case"), any party seeking
19 to act as an Interim Estate Representative for a deceased Injured Party shall have 90 days
20 from the date of this Order to serve on the defendants to such action a Declaration in the
21 form attached hereto as Exhibit A (where the Injured Party was intestate) or Exhibit B
22 (where the Injured Party had a Will). For cases transferred, removed or directly filed in
23 MDL 2452 after the date of this Order, any party seeking to act as an Interim Estate
24 Representative for a deceased Injured Party shall have 90 days from such transfer, removal
25 or direct filing to serve on the defendants to such action a Declaration in the form attached
26 hereto as Exhibit A (where the Injured Party was intestate) or Exhibit B (where the Injured
27 Party had a Will). Any such Declarations shall require the signature of the party seeking to
28

1 serve as Interim Estate Representatives.

2 D. In the event an Injured Party dies after said plaintiff's case has been removed,
3 direct filed, or otherwise transferred to MDL 2452, plaintiff's counsel shall promptly serve,
4 in accordance with Fed. R. Civ. P. 25, a notice of said death with the Court, and thereafter,
5 shall have 90 days from the date of said filing to amend the complaint naming: (1) a
6 derivative plaintiff who is formally qualified and/or appointed by another state or federal
7 court to represent the estate of the Injured Party, or (2) an Interim Estate Representative who
8 must serve a Declaration in accordance with the provisions of paragraph C, above. No
9 provision of this Stipulation shall preclude a defendant from filing a Suggestion of Death
10 pursuant to Fed. R. Civ. P. 25 at any time.

11 E. Any objections to the sufficiency of a Declaration served in accordance with
12 Paragraph C or D of this Stipulation shall be identified with a deficiency notice served upon
13 the Interim Estate Representative's counsel and Plaintiffs' Co-Lead Counsel in MDL 2452
14 within 30 days of the filing of the Declaration, or said objections as may be discerned from
15 the face of the Declaration are waived.

16 F. Upon timely notice of objection by counsel for any Defendant, the Interim
17 Estate Representative shall be given 30 days to cure or otherwise deny any alleged
18 deficiency in the Interim Estate Representative's Declaration. In the event the Interim Estate
19 Representative does not cure said deficiency, or advises Defendant that the Interim Estate
20 Representative's Declaration was filed consistent with this Order, then Defendants shall
21 exercise all reasonable efforts to meet-and-confer with the Interim Estate Representative's
22 counsel (for a period of at least 14 days). If, after the meet-and-confer process, any
23 objections remain unresolved, Defendants shall raise all remaining objections in a motion
24 to dismiss filed with the Court that shall be filed within 120 days of the filing of the
25 Declaration or the right to raise any objection with respect to the status of the Interim Estate
26 Representative under this Stipulation is waived. Any motion to dismiss filed in this regard
27 shall be without prejudice, on Notice filed by ECF, and permit fourteen (14) days for an
28

1 opposition, if any.

2 G. The appointment of an Interim Estate Representative under the provisions of
3 this stipulation shall be valid for eighteen months after the date of this order, at which time
4 the Federal Rules of Civil Procedure shall govern the capacity of a party to sue. For
5 purposes of relation back and application of the statute of limitations after said date, all
6 filings made by and all actions taken by an Interim Estate Representative prior to said date
7 shall be considered valid and effective.

8 H. Notwithstanding any other provision of this Stipulation, the filing of a Motion
9 to Amend the Complaint to replace the Interim Estate Representative with a person who has
10 the capacity to sue under the Federal Rules of Civil Procedure shall be required (i) prior to
11 trial of the action in this MDL proceeding, (ii) prior to compromise of the claim, (iii) prior
12 to any appeal taken; or (iv) upon remand or transfer of the action to another state or federal
13 court. Consistent with Federal Rules of Civil Procedure 17(a)(3) and Rule 25, prior to the
14 transfer of any case claiming wrongful death and/ or survival actions to another venue, the
15 Interim Estate Representative shall have ninety (90) days, or more time for cause shown, in
16 which to file a Motion to Amend the Complaint to substitute a personal representative or
17 other party as the plaintiff in the action, if required. All rights of the defendants are reserved
18 with respect to responding to any Motion to Amend the Complaint. Upon the granting of
19 any motion to Amend the Complaint to replace the Interim Estate Representative with a
20 person who is formally qualified and or appointed by another state or federal court to
21 represent the estate of the Injured Party, the status of the Interim Estate Representative under
22 this stipulation shall cease. In the event a Motion to Amend is not filed, or does not proffer
23 a person who is formally qualified to represent the estate in accordance with the terms of
24 this paragraph, all rights and defenses of the parties as to the pending Complaint are
25 reserved.
26

27 I. For Pending Cases, the naming of an Interim Estate Representative in full
28

1 satisfaction of the terms of this Stipulation shall relate back to the date on which the
2 Complaint was filed, provided that the Complaint was originally filed by the party who
3 came to be the Interim Estate Representative, or by another person who could have met the
4 requirements to serve as Interim Estate Representative. Defendants will not argue that the
5 statute of limitations continued to run in the period after the initial filing of a complaint but
6 prior to the appointment of the Interim Estate Representative.

7
8 J. For cases filed after the date of this Order by a person who becomes an Interim
9 Estate Representative in full satisfaction of the terms of this Stipulation, the Defendants will
10 not argue that the statute of limitations continued to run after the initial filing of the
11 Complaint.

12 K. Nothing in this Stipulation shall be construed to waive any objection to any
13 applicable statute of limitations defense or any other defense based on timeliness as to any
14 claim asserted, or to be asserted, in connection with the alleged Injured Party on any ground
15 other than as set forth in Paragraphs I and J above. Nothing in this Stipulation may be
16 construed as a waiver, to any extent, as to any party, with respect to any action not pending
17 or subsequently transferred to, or filed in, this MDL proceeding.

18 L. This Stipulation may be terminated on sixty (60) days' notice by any Party, and
19 this Stipulation shall, upon such termination, not be applicable with respect to any
20 subsequent case filed or transferred into this MDL, but such termination shall not have
21 retroactive effect with respect to any case filed or transferred prior to its termination.

22 NOW THEREFORE this Court approves this Stipulation and further ORDERS:

23 1. The Court further holds and otherwise appoints the Interim Estate Representa-
24 tive to be the "personal representative," as defined in the Health Insurance Portability and
25 Accountability Act ("HIPAA"), of the Injured Party's estate. A "personal representative"
26 is "an executor, administrator, or other person [who] has authority to act on behalf of a
27 deceased individual or of the individual's estate." 45 CFR 164.502(g)(4).
28

1 2. Moreover, this Court finds that a Declaration signed by the Interim Estate
2 Representative is sufficient and appropriate to be relied upon by all covered entities, as
3 defined in the Health Insurance Portability and Accountability Act ("HIPAA") 45 CFR Parts
4 160 and 164, which includes all physicians, hospitals, pharmacies, or other health providers
5 or practices, to disclose the Injured Party's records to the Interim Estate Representative and
6 or to any other person, party, or entity who receives a records request or release signed by
7 the Interim Estate Representative.
8

9 3. Nothing herein is intended to limit any rights under Federal Rules of Civil
10 Procedure 17, 21 or 25 with regard to the substitution of plaintiffs.

11 4. No other rights, authority or entitlements are granted to the
12 Interim Estate Representatives in any other state or federal court, or in any proceeding, or
13 regarding any matters or transactions, that are not expressly stated in this order.

14 IT IS SO ORDERED.

15
16 DATED: August 14, 2014

17
18 

19 Hon. Anthony J. Battaglia

20 U.S. District Judge
21
22
23
24
25
26
27
28